Supreme Court, U.S.
FILED
(1)
07-907 DEC 26 2007
OFFICE OF THE CLERK

79

No.

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia
Circuit

PETITION FOR WRIT OF CERTIORARI

Kenneth W. Johnson
Non-attorney, *pro se litigant of record*
9803 Allenford Circle, Apt. 203
North Potomac, Md. 20850
Telephone: (240) 314-7188

Questions Presented for Review

1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; 2) Johnson sought to enter into a contractual relationship with the defendant(s); 3) **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; and 4) **Johnson was refused or denied the goods or services** that w[ere] otherwise afforded to nonwhite customers:

1) Does Johnson's Amended Complaint fail to state a claim upon which relief may be granted under TITLE 42 U.S.C. § 1981, when Johnson alleged that he was discriminated against in violation of the prohibition of racial discrimination against whites?
2) Does any of the Judgments or Orders of the U.S. Court of Appeals or the U.S. District Court, conflict with a decision of the Supreme Court of the United States in either Swierkiewicz v. Sorema, 534 U.S. 506, 511 (2002), or McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 274(1976), or Foman v. Davis, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222, or deny Johnson equal protection of law, when Johnson alleged that he was refused services because he is a white man of mixed racial ancestry?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States District Court for the District of Columbia and United States Court of Appeals for the District of Columbia Circuit.

The Petitioner here and Plaintiff – Appellant is Kenneth W. Johnson.

The Respondent here and Defendants – Appellees are Jesse Gadson, Tony Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, McGuireWoods LLP.

CORPORATE DISCLOSURE STATEMENT

Kenneth W. Johnson is a person, an individual, a human being, and therefore, is not a corporation. There is no parent or publicly held company owning 10% or more of any corporate stock, a statement to this effect shall be included on this page. Supreme Court Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDINGS.....ii

CORPORATION DISCLOSURE STATEMENT....ii

TABLE OF CONTENTS.....iii-iv

TABLE OF AUTHORITIES.....v

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE 1

JURISDICTION 1

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOVLED IN THE CASE.....2

STATEMENT OF THE CASE.....3-4

ARGUMENT

The issue of whether Johnson failed to state a claim upon which relief may be granted.....5-11

The issue of whether Johnson was deny equal protection of law and equal benefit of law.....11-14

CONCLUSION.....14

TABLE OF AUTHORITIES

FEDERAL CASES

Aka v. Wash. Hosp. Ctr., 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc).....9, 13

Building Industry Ass'n of Superior California v. Norton, 247 F.3d 1241.....11

Foman v. Davis, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222.....4, 11, 12

Harrison v. Rubin, 174 F.3d 249, 252 (D.C. Cir. 1999).....12

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, at 274.....6, 8, 12

Swierkiewicz v. Sorema, 534 U.S. 506.....7, 8, 9, 12

FEDERAL STATUTES

TITLE 28 U.S.C § 1254.....1

TITLE 42 U.S.C. § 1981.....2, 4, 5, 13

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15(a) and (c).....4, 11, 13

Rule 60(b).....4, 11, 12, 13

Rule 59(e).....13

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

United States Court of Appeals Orders, Opinions or Judgments are located in the Appendix as follows:

October 9, 2007 JUDGMENT w/o Memo.....Apx 1

September 24, 2007 ORDER.....Apx 3

United States District Court's Orders, Opinions or Judgments are located in the Appendix as follows:

September 19, 2006 ORDER.....Apx 4
September 20, 2006 Amended Memorandum..Apx 5

October 23rd, 2006 .....Apx 16

November 9th, 2006.....Apx 21

JURIDICTION

The dates of the Judgments or Orders sought to be reviewed were entered are October 9, 2007, September 24, 2007 for the U.S. Court of Appeals, and September 19th—20th, 2006, October 23rd, 2006, and November 9th, 2006 for the U.S. District Court. Jurisdiction is conferred to the Supreme Court of the United States by Title 28 U.S.C § 1254. A Petition for Rehearing En Banc is pending in the United States Court of Appeals as of January_____, 2008. This Petition went to the commercial printer for mass production as of January_____, 2008.

THE CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

42 U.S.C. § 1981:

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceeding for the security of persons and property as is enjoyed by white citizens, and shall be subjected to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

STATEMENT OF THE CASE

(1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; (2) Johnson sought to enter into a contractual relationship with the defendant(s); (3) Johnson met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; (4) and Johnson was denied or refused the goods or services that w[ere] otherwise afforded to nonwhite customers.

The United States Court of Appeals rejected the initial arguments in Johnson's Appellate Briefs by ruling against them. Johnson's Appellate Briefs advanced the theory: (1) he is a racial minority; (2) he sought to enter into a contractual relationship with the defendant(s); (3) he met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) he was denied the goods or services that w[ere] otherwise afforded to white customers. The United States Court of Appeals for the District of Columbia Circuit ***rejected*** this theory on 10/9/2007 by holding that appellant's complaint failed to state a claim upon which relief may be granted. Presumably, the basis for the Court of Appeals decision on 10/9/2007 is that Johnson is a White man and is not a racial minority. Johnson concurs

that he is a White man and advances the legal theory stated in the first paragraph under the heading "Statement of the Case".

The United States Court of Appeal's 10/9/2007 Judgment completely ignores the fact that Johnson filed a timely Rule 60(b) Motion to Vacate Prior Judgment, which also asked for leave to amend the Amended Complaint pursuant to Rule 15(a) and (c) as well as the Supreme Court precedent in Foman v. Davis, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222. The United States Court of Appeals reviewed Johnson's 6/9/2006 Amended Complaint ***de novo***.

Johnson did not fail to allege facts in the Amended Complaint that if proven true establish: "(1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/ European or predominately Caucasian/European"; (2) **Johnson sought to enter into a contractual relationship** with the defendant(s); (3) **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; (4) and **Johnson was denied or refused the goods or services."**

The basis for federal question jurisdiction in the court of first instance was that Johnson had been racially discriminated against, and refused goods or services in violation of TITLE 42 U.S.C. § 1981.

ARGUMENT

A. The issue of whether Johnson failed to state a claim upon which relief may be granted

The United States Court of Appeals rejected the initial arguments in Johnson's Appellate Briefs by ruling against them. Johnson's Appellate Briefs advanced the theory: (1) he is a racial minority; (2) he sought to enter into a contractual relationship with the defendant(s); (3) he met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) he was denied the goods or services that w[ere] otherwise afforded to white customers. The United States Court of Appeals for the District of Columbia Circuit ***rejected*** this theory on 10/9/2007 by holding that appellant's complaint failed to state a claim upon which relief may be granted. Presumably, the basis for the Court of Appeals decision on 10/9/2007 is that Johnson is a White man and is not a racial minority.

Johnson's first contentions are these: White males may also sue for racial discrimination as a matter of law. "Section 1981 prohibits racial discrimination in private employment against white persons as well as nonwhites, and this conclusion is supported by the statute's language, which explicitly applies to "all persons," and by its legislative history. While the phrase "as is enjoyed

by white persons" would seem to lend some support to the argument that the statute is limited to the protection of nonwhite persons against racial discrimination, the legislative history is clear that the addition of the phrase to the statute as finally enacted was not intended to eliminate the prohibition of racial discrimination against whites."—*McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, at 274. "[T]here shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, ... shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other...."— *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, at 288.

Johnson's second contentions are these: Johnson is not required to plead the [e]ntire 4th element of the prima facie case for racial discrimination in order to survive the defendants' motion to dismiss, as a matter of law: "This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion

to dismiss."—*Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002).

It is clear that Johnson did not fail to plead elements 1 through 3 and part of 4 of the prima facie case for racial discrimination in the 6/9/2006 Amended Complaint, which establishes that: 1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/ European or predominately Caucasian/European"; 2) that Johnson sought to enter into a contractual relationship with the defendant(s); 3) that **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers (see the retainer agreements, e-mails, and other documents in the record at [R—181 through 207]); and 4) that **Johnson was refused or denied legal services**. Johnson is not required to plead the phrase: "that w[ere] otherwise afforded to nonwhite customers" in order to survive the defendant's motion to dismiss. See Swierkiewicz v. Sorema, 534 U.S. 506 through 515 (2002). "This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."—*Swierkiewicz v. Sorema*, 534 U.S. 506, 511.

"In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in

every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all elements of a prima facie case."—*Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002). It seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination ***is discovered***"—*Swierkiewicz* Id. supra at 506.

Simply put, Johnson would not be in the circumstances that he's in now if attorneys had taken the appropriate action a long time ago. The United States Court of Appeal's decisions and the United States District Court's decisions conflict with the decisions of the Supreme Court of the United States in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), and *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, at 274. Johnson argues that granting of the "Petition for Writ of Certiorari" is therefore necessary to secure and maintain uniformity of the court's decisions with those of the Supreme Court. Johnson has been variously abused by the attorneys listed in the Amended Complaint: See the 106 page Amended Complaint in the "Record" from the United States Court of Appeals. The Defendants' explanations to Johnson were merely pretext.

Attorney Jesse Gadson, a Black attorney, stated to Kenneth Johnson's face, "You have no civil rights", because of the fact that Johnson is a White man of mixed racial ancestry. He does not

think that Black people have no civil rights; he only thinks that Kenneth W. Johnson has no civil rights, because of the fact that Kenneth W. Johnson is a White man of mixed racial ancestry. Kenneth W. Johnson alleges in the Amended Complaint that Jesse Gadson told him to his face, "***You have no civil rights***". The allegation must be taken as true. See *Swierkiewicz v. Sorema*, 534 U.S. 506. The statement by Jesse Gadson: "***You have no civil rights***" falls in the category ***of discriminatory statements or attitudes*** on the part of the defendant. See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc). Jesse Gadson's statement begs the question: What is it about Kenneth W. Johnson that makes Jesse Gadson think that Kenneth W. Johnson has no civil rights [?], which is what Gadson said. Jesse Gadson does not think his Black clients have no civil rights; he thinks that about Kenneth W. Johnson, because Johnson is a White man of mixed racial ancestry. Jesse Gadson refused Kenneth W. Johnson the legal services that a[re] outlined in the retainer agreement, which states in part:

"It is hereby agreed by and between Kenneth Johnson, (hereafter Client) and JESSE A. GADSON, ATTORNEY AND COUNSELOR AT LAW, (hereafter Attorney), that in consideration of the retainer in the amount of $1,700.00 (non-refundable), said Attorney is hereby retained by the client to provide legal advice and representation, if necessary, regarding the following matter(s): To investigate the incident surrounding the police department role in closing the client business...."

"Specifically Attorney agrees to investigate the possibility of filing a lawsuit against the District of Columbia government."—Record in U.S. Ct. of App. at [R–181].

Tony Lee and McGuireWoods LLP refused Kenneth W. Johnson the legal services that a[re] outlined in the retainer agreement, which states in part:

"Retainer and Contingency Letter Agreement Johnson v. District of Columbia Gov't et al.

Dear Ken: This is to confirm our understanding with you with respect to our representation of you ('Client') in connection with the above-reference subject matter.

1. Nature of Services. The services to be rendered by our firm include, but are not limited to, advice on the strategy and litigation for the above-reference case, preparation of all necessary pleadings and case materials, prosecution of the case at trial and, if applicable, on appeal, and any other matters on which we may be asked to provide legal counsel from time to time....

2. Fees. Client agrees to pay attorney's fees for professional services as follows: 25% of any settlement or recovery prior to trial, 33% of any settlement, recovery, or judgment once the trial has commenced, and 40% if the case is appealed."

Jesse Gadson or Tony Lee and his law firm McGuireWoods LLP were supposed to sue for the recovery of Johnson's livelihood and his commercial real property where he earned his livelihood, which he lost as a direct result of the actions of the District of Columbia government and its police. They were also supposed to sue for the "many" violations of Johnson's civil rights, inter alia.

B. The issue of whether Johnson was *deny equal protection of law and equal benefit of law.*

The United States Court of Appeal's 10/9/2007 Judgment completely ignores the fact that Johnson filed a timely Rule 60(b) "Motion to Vacate Prior Judgment", which also asked for leave to amend the Amended Complaint pursuant to Rule 15(a) and (c) as well as the Supreme Court precedent in *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222. The United States Court of Appeals reviewed Johnson's 6/9/2006 Amended Complaint ***de novo***.

"Ordinarily, post judgment amendment of a complaint requires reopening of the judgment"—*Building Industry Ass'n of Superior California v. Norton*, 247 F.3d 1241. Fed.Rules.Civ.Proc.Rules 15(a), 59(e), 60(b), 28 U.S.C.A. Johnson's motions to vacate prior judgment and for leave to amend the Amended Complaint should have been granted. The Supreme Court precedent in ***Foman v. Davis***, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222 establishes that "....district court abused its

discretion in denying motion to amend complaint to assert right of recovery.... after dismissal of complaint." See also *Harrison v. Rubin*, 174 F.3d 249, 252 (D.C. Cir. 1999). Johnson wants appointed counsel to explain to the Supreme Court the reason that would justify relief from the operation of the September 19 or 20, 2006 Judgment/Order pursuant to Rule 60(b).

The U.S. District Court should have 1) vacated its judgment; 2) allowed Johnson to conduct discovery of the defendants; and 3) allowed Johnson to amend the June 9th 2006 Amended Complaint. Discovery would have revealed that the Defendants offer their services to nonwhite customers, yet refused Kenneth Johnson. Johnson did not need to amend the Complaint to assert allegations that he was racially discriminated against, because those allegations were already present in the Amended Complaint. Johnson wanted to conduct discovery of the defendants, add additional allegations to the Amended Complaint, and change the "Compensatory and Punitive Damages" portion of the Amended Complaint at page 101 of the Amended Complaint.

Johnson's 60(b) Motion to Vacate Prior Judgment was not granted, and ignored on Appeal. It is equal clear that Johnson is being denied the protections of law and the benefits of law that are spelled out in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d

222 or TITLE 42 U.S.C. § 1981 or Fed.Rules.Civ.Proc.Rules 15(a), 59(e), 60(b), 28 U.S.C.A. or *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc)! Johnson did not fail to state a claim upon which relief may be granted, yet his Amended Complaint was nonetheless dismissed for failure to state a claim upon which relief may be granted, when Johnson did not fail to state a claim upon which relief may be granted.

In attacking a defendant's explanation, a plaintiff is entitled to offer three categories of evidence: (1) evidence establishing the plaintiff's prima facie case; (2) evidence the plaintiff presents to attack the Defendant's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff; such as independent ***evidence of discriminatory statements or attitudes*** on the part of the Defendants. See *Aka v. Wash. Hosp. Ctr.*,, 156 F.3d at 1284, 1289(D.C. Cir. 1998) (en banc). The explanations that the Defendants gave to Kenneth W. Johnson w[ere] merely pretext to hide [t]he racial discrimination against Johnson, because Johnson is a White man of mixed racial ancestry.

CONCLUSION

For the reasons set forth herein, Johnson asks the Supreme Court of the United States to grant this Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, and asks the Supreme Court to mandate that the "Record" in the United States Court of Appeals for the District of Columbia in the case of Johnson v. Gadson et al., 06-7171 and 06-7204 be certified and transferred to the Supreme Court of the United States for review.

Kenneth W. Johnson

9803 Allenford Circle, Apt. 203
North Potomac, MD, 20850
240-314-7188

79

Supreme Court, U.S.
FILED
(2)
07-907 DEC 26 2007
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia
Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Kenneth W. Johnson
Non-attorney, *pro se litigant of record*
9803 Allenford Circle, Apt. 203
North Potomac, Md. 20850
Telephone: (240) 314-7188

TABLE OF CONTENTS FOR THE APPENDIX

United States Court of Appeal's

Orders, Opinions or Judgments
are located in the Appendix as follows:

October 9, 2007 JUDGMENT w/o Memo..... 1

September 24, 2007 ORDER..... 3

United States District Court's

Orders, Opinions or Judgments
are located in the Appendix as follows:

September 19, 2006 ORDER..... 4

September 20, 2006 Amended Memorandum..... 5

October 23rd, 2006 Memorandum Opinion/Order. 16

November 9th, 2006 ORDER..... 21

United States Court of Appeals
For The District of Columbia Circuit

No. 06-7171 September Term, 2007
06cv00022
Filed On: October 9, 2007

Kenneth W. Johnson,
Appellant

v.

Jesse Gadson, et al.,
Appellees

Consolidated with 06-7204

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed. The district court correctly concluded that appellant's complaint failed to state a claim upon which relief could be granted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
For The District of Columbia Circuit

No. 06-7171 September Term, 2007
06cv00022
Filed On: September 24, 2007

[1068846]
Kenneth W. Johnson,
Appellant

v.

Jesse Gadson, et al.,
Appellees

Consolidated with 06-7204

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion for oral argument, the response thereto, and the reply, it is

ORDERED that the motion be denied. Oral argument will not assist the court in this case. Accordingly, the court will dispose of the appeal without oral argument on the basis of the record and the presentations in the briefs. See Fed. R. App. P 34(a)(2); D.C. Cir. Rule 34(j).

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.**
	)	**06-22 (RWR)**
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' motions to dismiss be, and hereby are, GRANTED. The complaint is DISMISSED. It is further

ORDERED that plaintiff's motion to admit videotape evidence and defendant Lee's motion to strike the motion be, and hereby are, DENIED as moot.

This is a final, appealable Order.

SIGNED this 19th day of September, 2006

/s/

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 06-22 (RWR)**
	)	
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	
	)	

AMENDED MEMORANDUM OPINION

Pro se plaintiff Kenneth W. Johnson has filed an action against several individuals and a law firm, alleging violation of his civil rights under 42 U.S.C. §§ 1981 and 1983, legal malpractice, and intentional infliction of emotional distress. Each defendant[1] has moved to dismiss the complaint for failure to state a claim.[2] Because Johnson does not

---

[1] The complaint was dismissed as to defendants Stacy Lewis and Robert Mance because those defendants were not served with a summons and complaint.

[2] Defendants also argue that issue preclusion and the statute of limitations should bar this action. These contentions are without merit. Issue preclusion does not apply here because the events giving rise to the claims against the moving defendants have never before been litigated. The three-year D.C. statute of limitations on personal injury claims, D.C. Code § 12-301(8), which applies here by operation of a Supreme Court decision, Owens v. Okure, 488 U.S. 235, 249-

state a claim under the civil rights statutes, those claims will be dismissed, and supplemental jurisdiction of the state law claims will be declined under 28 U.S.C. § 1367(c)(3).

BACKGROUND

Johnson, a man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European" (Am. Compl. at 6), complains because none of the defendants, all attorneys, agreed to represent him in his pursuit of legal remedies relating to matters that occurred in 1997 when he was arrested, tried, and acquitted in the Superior Court for the District of Columbia.[3] On the basis of these refusals, he alleges race discrimination, legal malpractice, and intentional infliction of emotional distress.

According to Johnson, he approached attorney Jesse Gadson in 2002 about filing a claim

---

50 (1989), does not bar this action because Johnson filed this action on January 9, 2006, complaining of events that occurred no earlier than January 15, 2003. See also, Carter v. District of Columbia, 14 F.Supp. 2d 97, 102 (D.D.C. 1998) (stating that plaintiffs in this court "have the right to bring a Section 1981 or a Section 1983 claim at any time within three years of the alleged discrimination").

[3] The complaint itself, exclusive of the five volumes of attached exhibits, is 104 pages long, argumentative, and far from the "short and plain statement of a claim," or "simple, concise and direct" averment that Fed.R.Civ.P. 8(a)(2) and (e) requires.

for post-judgment relief, but Gadson declined and directed Johnson to the public law section of the Library of Congress. (Am. Compl. at 40-41.) Johnson visited Gadson again sometime shortly before January 15, 2003, because Gadson had given him more time and more valuable information than had any other attorney Johnson had contacted. (Id. at 41.) On January 15, 2003, Gadson entered into a contract with Johnson for the limited purpose of "investigat[ing] the possibility of filing a law suit against the District of Columbia government." (Id. at 40, 50 (quoting agreement between Gadson and Johnson).) After conducting the agreed-upon investigation, and viewing additional materials at Johnson's request, Gadson again declined to represent Johnson, expressly because Gadson felt he did not have the experience necessary for the case.4 (Id. at 44.)[4]

According to the amended complaint, in September 2003, Johnson asked Tony Lee, an attorney and partner in the law firm McGuireWoods, LLP,[5] to "provide legal counsel on filing a motion to set aside the prior judgment in Johnson v. District of Columbia . . . C.A. 3837-98 before the Superior Court of the District of

---

[4] Johnson, pro se, filed an action against the District of Columbia on June 4, 2003, which was dismissed on a motion to dismiss that was filed in late July 2003, because the claims were time barred. See Johnson v. District of Columbia, Civil Action 03-1218 (CKK) (D.D.C. Oct. 14, 2003).

[5] McGuireWoods is also a defendant, but without stating so, Johnson alleges McGuireWoods' liability by only through the acts of Lee. (See Am. Compl. at 68-78.)

Columbia pursuant to [R]ule 60(b). . . . And asked Tony Lee to have the July 15, 1998 judgment vacated. He refused[]!" (Am. Compl. at 53.) The amended complaint recounts some of the advice Lee gave Johnson and his conclusion that Lee could not help Johnson in his efforts. (Id. at 53-54.) The facts Johnson alleges suggest that Lee made a contract with Johnson and, as agreed, provided legal counsel to him.

Johnson alleges that he spoke to attorney Elbert Shore on April 15, 2004, about Shore entering an appearances in an action Johnson had filed pro se three days earlier captioned Johnson v. Mance, asserting claims relating to events occurring in 1997 and another event occurring in 2004.[6] (Am. Compl. at 66.) Johnson alleges that he paid Shore a $75.00 consultation fee and presented Shore with the facts underlying the Mance action, that Shore asked and was told about Johnson's mixed racial ancestry, and that Shore refused to represent Johnson in the matter. (Id.)

Then, sometime in June 2004, Johnson attempted to engage the legal services of Harold N. Harmon and Robert F. Condon. Johnson "offered his [pending *pro se*] lawsuit against Robert Mance" to Harmon and Condon and told them of the facts

---

[6] On August 6, 2004, the complaint was dismissed because the claims pled either failed to state a claim upon which relief could be granted or were barred by the statute of limitations. See Mem., Johnson v. Mance, Civil Action No. 04-591 (JR) (D.D.C. Aug. 5, 2004).

in the case. (Id. at 62.) A motion to dismiss in that case had been filed on June 7, 2006. Harmon and Condon later sent Johnson a retainer agreement, but before the agreement reached Johnson, the case was dismissed. (Id.) After Johnson informed Harmon and Condon that the case had been dismissed, they responded in a letter: "Please be advised that we will not be able to represent you in your case that was dismissed by Judge Robertson in the U.S. District Court or in your current Motion for Summary Reversal filed in the U.S. Court of Appeals for the District of Columbia." (Id.)

Johnson alleges that the defendants' refusals were racially discriminatory and deprived him of his civil rights in violation of 42 U.S.C. §§ 1981 and 1983. He also alleges that these same refusals constituted legal malpractice and the intentional infliction of emotional distress, in violation of state common law.

DISCUSSION

Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). A "complaint should not be dismissed unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. . . . To that end, the complaint is construed liberally

in the plaintiffs' favor, and we grant plaintiffs the benefit of all inferences that can be derived from the facts alleged. . . . However, the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citations omitted).

I. THE FEDERAL CIVIL RIGHTS CLAIMS

A. Claim for discrimination under 42 U.S.C. § 1981

Johnson alleges that all defendants violated § 1981 when they "refused to either make or enforce a contract with Johnson, because Johnson is a predominately Caucasian U.S. Citizen, who has scant physical evidence of any African blood or ancestry . . . ." (Am. Compl. at 6.) Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." Johnson claims that the black defendants — who are not identified — have discriminated against him because he appears white. (Am. Compl. at 6.) He also alleges that white defendants — who are not identified — have discriminated against him because although he appears white, they knew of his black ancestry. (Id.) The only defendant Johnson alleges knew of his black ancestry is Elbert Shore. (Id. at 66.)

Johnson infers race-based discrimination by all the defendants, but for each defendant, that inference enjoys no support from the facts Johnson pleads. First, Johnson alleges that he was perceived as a white citizen by all defendants except Shore, who knew of his black ancestry. (Am. Compl. at 6, 66.) White plaintiffs certainly may sue under § 1981. However, because § 1981 entitles all persons to the same contracting rights as are "enjoyed by white citizens," Johnson's allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981. See MacInstosh v. Building Owners & Managers Ass'n Intern., 355 F. Supp. 2d 223, 226 (D.D.C. 2005) (discussing how although a § 1981 plaintiff need not be a person of color, the conduct complained of must involve some racially motivated differentiation (citing Glymph v. District of Columbia, 211 F. Supp. 2d 152, 154 (D.D.C. 2002))).

Second, other facts Johnson alleges do not support an inference of race-based discrimination as to any of the defendants, including Shore. Johnson pleads facts that establish that each defendant met with Johnson, agreed to evaluate his case and then, only after evaluating the merits of Johnson's case, declined to provide representation. In the case of each defendant, the facts Johnson pleads demonstrate that each defendant was either willing to (Harmon & Condon), or did (Gadson, Lee, Shore), make a contract with

Johnson, some only for the limited purpose of evaluating or providing legal advice on the efficacy of pursuing a claim.[7] In the case of each defendant, the facts Johnson alleges reflect that the representation was declined for professional (Gadson) or legal (Lee, Shore, Harmon & Condon) reasons. Even with respect to Shore, Johnson's allegations do not support an inference of race based discrimination in contracting. Shore agreed to provide a legal consultation and did so. Then, after learning of the facts of the case, he declined to represent Johnson in the already filed Johnson v. Mance action.

In short, Johnson's factual allegations do not support an inference of race-based discrimination. The only suggestions of race-based conduct in the complaint are the sweeping and factually unsupported conclusions asserted by Johnson. Such conclusions, devoid of factual support, are not credited on a motion to dismiss. Kowal, 16 F.3d at 1276 (noting that a court is not required to "accept legal conclusions cast in the form of factual allegations"). Accordingly, the § 1981 claim as to each defendant will be dismissed for failure to state

---

[7] Johnson appears to harbor the belief that if he pays an attorney for legal advice and then wants to pursue a course of action against legal advice, that he can command an attorney to represent him. This is not necessarily so. An attorney is both a professional and an officer of the court who is not only entitled, but also obligated, to use his professional legal judgment in accord with his ethical responsibilities to decline to make arguments or representations that are not supported in either fact or law.

a claim upon which relief may be granted. Fed. R. Civ. P. 2(b)(6).

B. Claim for discrimination under 42 U.S.C. § 1983

Johnson alleges that the defendants' refusals to represent him in his pursuit of legal remedies violated § 1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." "To state a claim under section 1983, a plaintiff must allege both (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that the defendant acted 'under color of' the law of a state, territory or the District of Columbia." Hoai v. Vo, 935 F.2d 308, 312 (D.C. Cir. 1991) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)).

First, as was true with Johnson's § 1981 claims, Johnson does not make factual allegations that reflect that he was deprived of any right secured by federal law. Second, Johnson does not allege that the defendants were state officials,[8] or

[8] An attorney licensed to practice law is not acting under color of law by dint of his membership in the bar and status as an

that they conspired with state officials or willfully engaged in joint activity with a state or its agents in their refusal to represent Johnson. See id. Accordingly, Johnson's allegations do not state a claim for which relief may be granted under 42 U.S.C. § 1983 and that claim will be dismissed as to each defendant.

II. THE STATE COMMON LAW CLAIMS

If "the district court has dismissed all claims over which it has original jurisdiction," the court may decline to exercise supplemental jurisdiction over remaining state law claims.[9] 28 U.S.C. § 1367(c)(3). Accordingly, supplemental jurisdiction over Johnson's state common law claims will be declined and those claims will be dismissed for lack of jurisdiction.

---

officer of the court. See Polk v. Dodson, 454 U.S. 312, 318 (1981); Van Daele v. Vinci, 294 F. Supp. 71, 74 (N.D. Ill. 1968)("Merely acting under a state license is not state action within the context of the civil rights acts."); Sullivan v. Stein, No. Civ. 3:03 CV 1203 (MRK), 2004 WL 1179351, *11 (D. Conn. May 21,2004) ("It is well-settled . . . that private attorneys do not act under color of state law and are not state actors simply by virtue of their state-issued licenses to practice law.").

[9] Johnson asserts diversity jurisdiction. (See Compl. at 3; Am. Compl. at 3.) However, he fails to plead complete diversity of citizenship, and the face of the complaint (and of the amended complaint) reflect an absence of complete diversity. Both Johnson and defendant Shore have addresses in Maryland and Maryland citizenship has not been disputed. Thus, there is no diversity jurisdiction over this action under 28 U.S.C. § 1332(a).

CONCLUSION

Because Johnson's factual allegations do not state a claim under the civil rights statutes, those claims will be dismissed. Because supplemental jurisdiction of the state law claims will be declined under 28 U.S.C. § 1367(c)(3), those claims will be dismissed. Because the complaint will be dismissed, the two pending motions relating to admission of evidence will be denied as moot. A final, appealable Order accompanies this memorandum Opinion.

SIGNED this 20th day of September, 2006.

/s/
RICHARD W. ROBERTS
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 06-22 (RWR)**
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Kenneth W. Johnson has filed motions to reconsider and vacate an order dismissing his complaint. He has also filed a motion to admit evidence of his current and intended future domicile related to the issue of diversity jurisdiction. Because Johnson does not identify any reason with legal merit to reconsider or vacate the order, and because the offered evidence would not remedy the flaw in diversity jurisdiction, his motions will be denied.

BACKGROUND

Johnson filed a complaint asserting federal question, supplemental and diversity jurisdiction, and alleging violations of his federal civil rights under 42 U.S.C. §§ 1981 and 1983, legal malpractice and intentional infliction of emotional

distress. The federal civil rights claims were dismissed for failure to state a claim upon which relief could be granted. The common law claims were dismissed because the complaint did not establish diversity jurisdiction and supplemental jurisdiction was declined. See Memorandum Opinion & Order, Sept. 19, 2006. Johnson has moved for relief from the dismissal under Fed. R. Civ. P. 59(e) and 60(b)(2), and to admit evidence of his current and intended future domicile.

DISCUSSION

I. MOTIONS FOR RECONSIDERATION AND TO ADMIT DOMICILE EVIDENCE

A motion for reconsideration under Fed. R. Civ. P. 59 is not intended to provide a vehicle to reargue facts already presented. Messina v. Krakower, 439 F.3d 755, 759 (D.C. Cir. 2006) (affirming denial of Rule 59(e) motion where plaintiff did nothing more than rely on the same arguments originally made). Rather, such a motion "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Id. at 758 (quotation marks and citation omitted).

Johnson contends that his complaint did not fail to state a claim upon which relief may be granted. (Pl.'s Mot. for Reconsideration at 1.) His argument, however, focuses primarily on his legal malpractice allegations, about which no finding

was made with respect to the sufficiency of the pleading. (Id. at 2-5.) Johnson has not identified a basis for reconsidering the decision as to the federal civil rights claims. He has, at the most, reargued facts already presented.

Johnson also argues in his motion for reconsideration that diversity jurisdiction exists. (Id. at 1.) In support of that argument, and attached to a motion to admit evidence, he filed an affidavit and documents demonstrating that he lives in Maryland and intends to remain domiciled in Maryland, and that at least one of the defendants is a Virginia citizen. Johnson's arguments and evidence do not meet the test of diversity jurisdiction, as diversity jurisdiction cannot be established on the basis of the citizenship of the plaintiff and one of multiple defendants. Diversity jurisdiction requires complete diversity between adversaries at the time the suit is filed, such that no defendant may be a citizen of the state of which any plaintiff is a citizen. [1] See Saadeh v. Farouki, 107 F.3d 52, 54-55 (D.C. Cir. 1997) (stating that "'federal diversity jurisdiction is lacking if there are any litigants from the same state on opposing sides.'" (citing Prakash v. American Univ., 727 F.2d 1174, 1178 n.25 (D.C. Cir. 1984)).

---

[1] Johnson's point that defendant Elbert Shore, whose address on the face of the complaint was listed as Maryland, was not involved in the series of events giving rise to the asserted cause of action until April 15, 2004, is irrelevant. (Pl.'s Mot.for reconsideration at 13-14.)

MOTION TO VACATE

A motion for relief from a judgment or order may be based upon newly discovered evidence. Fed. R. Civ. P. 60(b)(2). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. Johnson argues that newly discovered evidence relating to his legal malpractice claims previously brought in Superior Court warrants granting his Rule 60(b)(2) motion. (Pl.'s Mot. to Vacate at 1.) What Johnson erroneously characterizes as newly discovered evidence is a memorandum opinion and judgment of the District of Columbia Court of Appeals issued September 28, 2006, affirming the District of Columbia Superior Court's orders denying Johnson's motions under Super. Ct. Civ. R. 60(b) in which Johnson asserted that his adversary had committed fraud upon the court. (See Mem. Op. & J., Johnson v. District of Columbia, Nos. 04-CV-115 and 04-CV-442 (D.C. Ct. App. Sept. 28, 2006) at 1 ("The trial court found no merit to the claims of fraud, and neither do we. We accordingly affirm.").) The decision of the appeals court does not constitute newly discovered evidence relevant to the federal civil rights claims, or any other claims, that Johnson asserted in his complaint in this case.

CONCLUSION AND ORDER

Because Johnson has not identified a sound legal basis for either reconsidering or vacating the order dismissing his complaint, and because the evidence he offered will not alter the conclusion that diversity jurisdiction was not established, Johnson's motions will be denied. Accordingly, it is hereby ORDERED that Johnson's motion for reconsideration of the September 19, 2006 order be, and hereby is, DENIED. It is further ORDERED that Johnson's motion to vacate the September 19, 2006 order be, and hereby is, DENIED. It is further ORDERED that Johnson's motion to admit evidence be, and hereby is, DENIED.

SIGNED this 23rd day of October, 2006.

/s/

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
Plaintiff,	)	
v.	)	**Civil Action No.**
	)	**06-22 (RWR)**
STACEY LEWIS et al.,	)	
Defendants.	)	
	)	

ORDER

Plaintiff Kenneth W. Johnson has filed a motion seeking reconsideration of an order dated October 23, 2006 that denied Johnson's motion to vacate an order dismissing his complaint. Johnson's motion attempts to reargue facts and legal arguments already presented, but a motion for reconsideration under Fed. R. Civ. P. 59 is not a vehicle to reargue facts and argument already presented. See Messina v. Krakower, 439 F.3d 755, 759 (D.C. Cir. 2006) (affirming denial of Rule 59(e) motion where plaintiff did nothing more than rely on the same arguments originally made). Accordingly, it is hereby ORDERED that Johnson's motion for reconsideration of the October 23, 2006 order be, and hereby is, DENIED.

SIGNED this 9th day of November, 2006.

/s/
RICHARD W. ROBERTS
United States District Judge

83

(3)

No. 07-907

FILED
FEB 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KENNETH W. JOHNSON,

Petitioner,

v.

JESSE GADSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS TONY S. LEE AND McGUIREWOODS LLP

JOHN S. BARR
Counsel of Record
WILLIAM H. BAXTER II
McGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
Telephone: (804) 775-1000
Facsimile: (804) 698-2238

CHARLES WM. McINTYRE
McGUIREWOODS LLP
1050 Connecticut Avenue
Suite 1200
Washington, DC 20036-5317
Telephone: (202) 857-1700
Facsimile: (202) 828-2967

Counsel for Respondents
Tony S. Lee and McGuireWoods LLP

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in affirming the dismissal of Petitioner's Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), when his pleading did not state a claim of racial discrimination for which relief can be granted under 42 U.S.C. § 1981, and Petitioner pled detailed facts showing that no racial discrimination had occurred?

2. Whether the court of appeals erred in affirming the dismissal of Petitioner's Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), when his pleading did not state any equal protection claim for which relief can be granted, and Petitioner pled detailed facts below showing that no denial of equal protection had occurred?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit, were Plaintiff-Appellant Kenneth W. Johnson ("Petitioner"), and Defendants-Appellees Jesse Gadson, Tony S. Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, and McGuireWoods LLP.

Stacey Lewis and Robert Mance were defendants in the district court proceedings. The district court dismissed them by Order dated July 10, 2006 for lack of service, and they are not parties to Petitioner's appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent McGuireWoods LLP states that it is a private law firm. It does not have any parent corporation, and no publicly held corporation owns a 10% or greater interest in it.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTIONS STATED FOR REVIEW.....i

PARTIES TO THE PROCEEDINGS BELOW.....ii

CORPORATE DISCLOSURE STATEMENT.....iii

TABLE OF CONTENTS.....iv

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTIONAL STATEMENT.....1

RELEVANT STATUTES INVOLVED IN THE CASE.....1

COUNTERSTATEMENT OF THE CASE.....2

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.....4

I. Petitioner failed to state a cognizable Section 1981 claim.....5

II. Petitioner also does not raise any cognizable Equal Protection claim.....7

CONCLUSION.....8

TABLE OF AUTHORITIES

FEDERAL CASES

Foman v. Davis, 371 U.S. 178 (1962).....7-8

Johnson v. District of Columbia,
127 S. Ct. 1493 (2007).....6

McDonald v. Santa Fe Trail
Transportation Co., 427 U.S. 273 (1976).....6

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973).....6

Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002).....6

FEDERAL STATUTES AND COURT RULES

42 U.S.C. § 1981 .....passim

42 U.S.C. § 1983 2-4

Fed. R. Civ. P. 12(b)(6).....passim

U.S. Sup. Ct. R. 10.....8

U.S. Sup. Ct. R. 29.6.....iii

OPINIONS BELOW

This is a Brief in Opposition to a Petition for Writ of Certiorari from an unreported per curiam decision entered on October 9, 2007, which affirmed the dismissal of Kenneth W. Johnson's ("Petitioner's") Complaint for failure to state any claim upon which relief can be granted. The text of this unreported per curiam decision is reproduced at pages 1-2 of the Appendix to the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

On October 16, 2007, Petitioner filed his Petition for Rehearing Pursuant to FRAP 40 in the United States Court of Appeals for the District of Columbia Circuit. He filed his Petition for Rehearing En Banc in that court on November 6, 2007.

These petitions remained pending in the D.C. Circuit when Petitioner filed his Petition for Writ of Certiorari on December 26, 2007 (docketed on January 9, 2008), and his "January 16, 2008" Corrected Petition for Writ of Certiorari (undocketed), in this Court. (See Corrected Pet. at 1.)

The court of appeals denied Petitioner's petition for rehearing en banc by Order dated January 23, 2008. That same day, it also denied his petition for panel rehearing, as well as his motion for appointment of counsel, deeming such appointment unwarranted because Petitioner did not show a "sufficient likelihood of success on the merits" of his case.

RELEVANT STATUTES INVOLVED IN THE CASE

Petitioner cites 42 U.S.C. § 1981, which is accurately reproduced on page 2 of his Corrected Petition.

Although the second question presented by Petitioner references an alleged denial of equal protection, Petitioner did not formally plead any constitutional count below.

By Order dated March 8, 2007, the court of appeals summarily affirmed the dismissal of Petitioner's claim under 42 U.S.C. § 1983. Petitioner did not appeal that decision.

COUNTERSTATEMENT OF THE CASE

Petitioner filed a 104-page Complaint, along with five volumes of accompanying exhibits, in the United States District Court for the District of Columbia on January 9, 2006. Petitioner alleged violations of his civil rights under 42 U.S.C. §§ 1981 and 1983, and he pled pendent state law claims for both legal malpractice and intentional infliction of emotional distress.

On February 10, 2006, Respondent Lee moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief could be granted. Respondents Gadson, Harmon, Condon, and Shore also filed similar motions.

On May 30, 2006, the district court granted Petitioner leave to amend his Complaint to add McGuireWoods LLP as an additional defendant. McGuireWoods LLP and Lee filed their motion to dismiss the 106-page Amended Complaint pursuant to Rule 12(b)(6) on July 10, 2006. That same day, the district court dismissed defendants Stacey Lewis and Robert Mance from the case, as Petitioner had never filed any proofs of service for them, and had not responded to a Show Cause Order requesting such evidence.

By Order dated September 19, 2006, the district court granted the Rule 12(b)(6) motions to dismiss. In an eleven-page memorandum opinion, the district court concluded that

Petitioner failed to state any claims upon which relief could be granted.

First, it observed that Petitioner's Section 1981 claim failed because his "allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981." (Mem. Op. at 7) (citations omitted). It also held that the facts pled by Petitioner showed that defendants had exercised their professional judgment when declining to represent him, and not engaged in any racial discrimination. (Id. at 7-8.)

Second, it concluded that Petitioner's Section 1983 claim failed because the facts as pled showed no deprivation of any right secured by federal law, and because defendants were not state officials (or acting in conjunction with state officials) when declining to represent him. (Mem. Op. at 9-10.)

Third, it refused to exercise pendent jurisdiction over Petitioner's state law claims, and dismissed them for lack of jurisdiction. (Id. at 10.)

On September 20, 2006, the district court amended its opinion to add a footnote regarding Petitioner's failure to plead diversity jurisdiction.

On September 27, 2006, Petitioner moved the district court to reconsider its decision. On October 2, 2006, he also moved it to vacate its ruling. By Memorandum Opinion and Order dated October 23, 2006, the district court denied these motions.

On November 3, 2006, Petitioner moved the district court to reconsider the denial of his motion to reconsider and

motion to vacate. The district court denied this motion by Order dated November 9, 2006.

Petitioner filed several notices of appeal to the United States Court of Appeals for the District of Columbia Circuit. Respondents moved the court of appeals to summarily affirm the district court's holdings, while Petitioner moved, in turn, for summary reversal. By unpublished per curiam Order dated March 8, 2007, a panel of the D.C. Circuit denied his motion. It also granted Respondents' motions for summary affirmance on Petitioner's Section 1983 claim, but denied them as to his Section 1981 and state law claims.

Following merits briefing on these remaining claims, the panel affirmed the dismissal of those claims by Judgment dated October 9, 2007. Petitioner filed his petitions for panel rehearing on October 16, 2007, and for rehearing en banc on November 6, 2007.

While these petitions were pending below, Petitioner filed a five-page Petition for Writ of Certiorari in this Court on December 26, 2007. He then filed a fourteen-page "January 16, 2008" Corrected Petition for Writ of Certiorari.

By Orders dated January 23, 2008, the D.C. Circuit denied Petitioner's request for panel rehearing, and rehearing en banc.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The district court's dismissal of Petitioner's case for failure to state any claim on which relief can be granted, and the court of appeals' affirmance of this dismissal, are logical and compelled by existing law. The Petition for Writ of Certiorari (and the Corrected Petition) do not assert that this affirmance creates any conflict with decisions from any other

courts of appeals, and indeed do not cite any decision from any sister circuit. Nor do they otherwise raise any unsettled question of federal law, or any conflict with prior decisions by this Court. Although one of Petitioner's questions alleges a conflict with three decisions by this Court, no such conflict exists.

The fact of the matter is that Petitioner – after given an opportunity to amend below – pled facts showing that the respondents did not discriminate against him, or violate his equal protection rights, due to his race. The record amply reveals that Respondents refused to represent him because his claims against the District of Columbia stemming from his 1997 arrest were either without merit, or time-barred. Thus, this Court should deny him a writ of certiorari.

I. Petitioner failed to state a cognizable Section 1981 claim.

Petitioner's detailed and extensive factual allegations confirm beyond all doubt that Respondents did not decline to represent him for race-related reasons. The 1,151 pages of exhibits accompanying his Complaint confirm beyond all dispute that Respondents did not represent him because of sound legal reasons having nothing to do with his race.

The record below reveals that Petitioner was arrested in 1997, and tried in the Superior Court for the District of Columbia, where he was subsequently acquitted. Petitioner sued the District in May 1998 over events stemming from his arrest, but his litigation was dismissed for failure to satisfy mandatory notice requirements set forth in the D.C. Code.

Importantly, Petitioner waited over five years before asking the Superior Court to reconsider its ruling based upon allegedly fraudulent statements that the District made when moving to dismiss his case. The D.C. Court of Appeals held

that Petitioner's motion was untimely, and that his case was properly dismissed in any event because he had not met the substantive requirements for showing fraud. Last year, his suit came to this Court, which correctly denied his Petition for Writ of Certiorari, Johnson v. Dist. of Columbia, 127 S. Ct. 1493 (2007), as it should similarly do here.

Petitioner then proceeded to bring federal lawsuits – first against the District, and then against attorneys he had contacted – seeking to recover damages that he believed he was owed from his failed original suit. All of these lawsuits have failed. The instant lawsuit, as it relates to Respondents Lee and McGuireWoods LLP, contends that they (like other Respondents) refused to represent him because of his race. However, the facts pled by Petitioner showed otherwise, and showed conclusively that Lee and McGuireWoods declined to represent Petitioner because his claims were meritless and time-barred because of actions that Petitioner took (or failed to take) long before he had ever contacted them. Simply put, the record objectively disproves any notion that "Johnson would not be in the circumstances that he's in now if attorneys had taken the appropriate action a long time ago." (Corrected Pet. at 8.)

Petitioner now argues to this Court that he was never required to plead all four of the prima facie elements for race discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). But whether that is so is irrelevant, as Petitioner went far beyond the boundaries of notice pleading, and actually pled himself out of court by flooding the record with facts contradicting his claims of racial discrimination. Thus, there is no conflict – actual or perceived – between the well-founded affirmance below, and this Court's decisions in Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002), or McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

The record plainly confirms that Respondents refused to represent Petitioner because his claims against the District were meritless and/or time-barred for reasons having nothing to do with Respondents. This rendered Petitioner's Section 1981 claim ripe for dismissal under Rule 12(b)(6). Because multiple courts have reviewed this detailed record, and held that Petitioner failed to state any claim on which relief can be granted, this Court should refuse to grant him a writ.

II. Petitioner also does not raise any cognizable Equal Protection claim.

Petitioner's equal protection claim, not formally pled in the district court as a count in the Amended Complaint, similarly fails to state any cause of action. Petitioner cites Foman v. Davis, 371 U.S. 178, 182 (1962), to assert that he should have been granted further leave to amend following the dismissal of his Amended Complaint. But the quotation on pages 11-12 of his Corrected Petition appears nowhere in Foman, which, in any event, is unhelpful to him. In Foman, this Court stated that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." 371 U.S. at 182 (emphasis added). But that obviously is not the case here.

As the record shows, the facts and circumstances pled by Petitioner demonstrate that his equal protection claim (to the extent pled), like his Section 1981 claim, is not a proper subject of relief. Petitioner is not entitled to discovery on his defective claims. Because Petitioner failed to state any claim of racial discrimination for which relief can be granted under Section 1981, there is no basis for allowing him discovery on his allegations – especially when he pled facts unequivocally demonstrating that no racial discrimination, or denial of equal protection, had occurred.

In short, there is no conflict between the affirmance below and Foman. As this Court has noted, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10. This case presents no reason to depart from this sound rule.

CONCLUSION

This matter presents no viable issue for this Court to consider. Petitioner pled facts showing that Respondents had not racially discriminated against him, and compelling the dismissal of his Amended Complaint under Rule 12(b)(6). For the foregoing reasons, and the additional reasons stated in the record, Respondents Tony S. Lee and McGuireWoods LLP respectfully request that this Court deny the Petition and Corrected Petition for Writ of Certiorari.

Respectfully submitted:

John S. Barr* *(Counsel of Record)
William H. Baxter II
McGuireWoods LLP, One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
Telephone: (804) 775-1000
Facsimile: (804) 698-2238

Charles Wm. McIntyre
McGuireWoods LLP
1050 Connecticut Avenue, Suite 1200
Washington, DC 20036-5317
Telephone: (202) 857-1700
Facsimile: (202) 828-2967

Counsel for Respondents Tony S. Lee
and McGuireWoods LLP

86

FILED
FEB 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 07-907

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

REPLY BRIEF FOR PETITIONER KENNETH W. JOHNSON IN REPLY TO THE BRIEF IN OPPOSTION FOR RESPONDENTS TONY S. LEE AND McGUIREWOODS LLP

Kenneth W. Johnson
Non-attorney, *pro se litigant of record*
9803 Allenford Circle, Apt. 203
North Potomac, Md. 20850
Telephone: (240) 314-7188

Questions Presented for Review

1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; 2) Johnson sought to enter into a contractual relationship with the defendant(s); 3) **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; and 4) **Johnson was refused or denied the goods or services** that w[ere] otherwise afforded to nonwhite customers:

1) Does Johnson's Amended Complaint fail to state a claim upon which relief may be granted under TITLE 42 U.S.C. § 1981, when Johnson alleged that he was discriminated against in violation of the prohibition of racial discrimination against whites?
2) Does any of the Judgments or Orders of the U.S. Court of Appeals or the U.S. District Court, conflict with a decision of the Supreme Court of the United States in either *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222, or deny Johnson equal protection of law, when Johnson alleged that he was refused services because he is a white man of mixed racial ancestry?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States District Court for the District of Columbia and United States Court of Appeals for the District of Columbia Circuit.

The Petitioner here and Plaintiff – Appellant is Kenneth W. Johnson.

The Respondent here and Defendants – Appellees are Jesse Gadson, Tony Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, McGuireWoods LLP.

CORPORATE DISCLOSURE STATEMENT

Kenneth W. Johnson is a person, an individual, a human being, and therefore, is not a corporation. There is no parent or publicly held company owning 10% or more of any corporate stock, a statement to this effect shall be included on this page. Supreme Court Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDINGS.....ii

CORPORATION DISCLOSURE STATEMENT....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv-vi

JURISDICTION 1

REPLY STATEMENT OF THE CASE.....2

ARGUMENT

The issue of whether Johnson failed to state a claim upon which relief may be granted.....6

The issue of whether Johnson was deny equal protection of law and equal benefit of law.....7

CONCLUSION.....13

TABLE OF AUTHORITIES

FEDERAL CASES

Aka v. Wash. Hosp. Ctr., 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc).....6, 8

Brown v. United States, 239 U.S.App.D.C.345, 356-357 (en banc).....11

Carter v. District of Columbia, 14 F.Supp. 2d 97, 102 (D.D.C. 1998).....5

Foman v. Davis, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222.....i, 7, 8

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577.....4, 5

Hazel-Atlas Glass Co. v. Hartford-empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L. Ed. 1250.....9

Kenner v. Commissioner of the Internal Revenue, 387 F.2d 689, 691, certiorari denied 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112.....10

Lockwood v. Bowles, D.C.D.C. 1969, 46 F.R.D. 625, 634.....9

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, at 274.....i, 2, 7, 8

McDonnell Douglas Corp. v. Green.....3, 4

Owens v. Okure, 488 U.S. 235, 249-50(1989).....5

Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).....12

Serysko v. Chase Manhattan Bank, 461 F.2d 699, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139.....10

Swierkiewicz v. Sorema, 534 U.S. 506.....i, 2, 3, 4, 5, 6, 7, 8

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121.....4

Valerio v. Boise Cascade Corp., 80 F.R.D. 625, 640, citing Wright & Miller, affirmed C.A. 9th, 645 F.2d 699, certiorari denied 102 S.Ct. 976, 454 U.S. 1126, 71 L.Ed.2d 113.....10

Wilkin v. Sunbeam Corp., 405 F.2d 165.....10

FEDERAL STATUTES

TITLE 28 U.S.C § 1254.....1

TITLE 42 U.S.C. § 1981.....i, 2, 3, 5, 8

TITLE 42 U.S.C. § 1983.....5

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(a)(2).....4

Rule 15(a) and (c).....8

Rule 60(b).....8, 9

Rule 59(e).....8

STATE CASE

Cobb v. Cobb, 116 WLR 1993 (Super. Ct. 1998)....10

STATE STATUES

D.C. Code § 12-301(1).....11

D.C. Code § 12-301(8).....5

D.C. Code § 12-309.....11

OTHER AUTHORITES

WRIGHT-MILLER-KANE,
Federal Practice and Procedure
§ 2870, pages 409-412.....10

JURIDICTION

On October 9th 2007, the United States Court of Appeals for the District of Columbia Circuit entered its JUDGMENT, which states:

"This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief's filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed. The district court correctly concluded that appellant's complaint failed to state a claim upon which relief could be granted"

The text of this unreported per curiam decision is reproduced at pages 1-2 of the Appendix to the Petition for Writ of Certiorari.

Kenneth Johnson hand delivered to the Supreme Court 40 copies of THE DOCKETED Petition for Writ of Certiorari in No. 07-907 on the NIGHT of January 8, 2008. It was subsequently placed on the docket THE NEXT MORNING, which was January 9, 2008 by the Clerk of the Supreme Court. The jurisdiction of this Court is based on the October 10, 2007 JUDGMENT of the United States Court of Appeals for the District of Columbia. Jurisdiction is conferred to the Supreme Court of the United States by Title 28 U.S.C § 1254.

REPLY STATEMENT OF THE CASE

The "Brief in Opposition for Respondents Tony S. Lee and McGuireWoods LLP" maintains that the U.S. District Court "...observed that Petitioner's Section 1981 claim failed because his 'allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981." (Brief in Opp. at 3) completely misses the point. Johnson alleged that he was racially discriminated against because he is a White man and was refused the legal services that were otherwise afforded to nonwhites. The fact that the Defendants saw him as white and treated him like a white man is not the issue; the fact that the Defendants refused Johnson the legal services that they afford to nonwhites customers is the issue. The "Questions Presented" in the Petition for Writ of Certiorari and repeated here make it clear what the issues are that [t]he Petitioner has ask this Court to decide.

The United States Court of Appeals ruled against a firm act of law established by this Court in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), as well as *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976). In *Swierkiewicz Id.* supra, the Petitioner, a 53-year-old native of Hungry, filed a lawsuit against the respondent, his former employer, alleging that he had been fired on account of his national origin in violation of Title VII of the Civil Rights Act of 1964

and on account of his age in violation of the Age Discrimination in Employment Act of 1967(ADEA). In affirming the District Court's dismissal of the complaint, the Second Circuit relied on its settled precedent requiring an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802. The Second Circuit held that petitioner had failed to meet his burden *because his allegations were insufficient as a matter of law to raise an inference of discrimination.* The Supreme Court of the United States reversed the Second Circuits holding and remanded the case for further proceedings consistent with its opinion: See *Swierkiewicz v. Sorema*, 534 U.S. at pages 506, 507 and 515(2002).

Here it is uncontroverted that the U.S. District Court as well as the U.S. Court of Appeals held that Kenneth W. Johnson failed to meet his burden *because his allegations were insufficient as a matter of law to raise an inference of discrimination*, when they held "Petitioner's Section 1981 claim failed because his 'allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981". This holding is in direct conflict with the holding of the Supreme Court in *Swierkiewicz v. Sorema*, 534 U.S. at 506 and 507(2002), where the Supreme Court reversed the Second Circuit.

In addition, the Supreme Court in *Swierkiewicz v. Sorema*, 534 U.S. at 506 "*Held*: An employment discrimination complaint need not contain specific facts establishing a prima facie case under the McDonnell Douglas framework, but instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2). The *McDonnell Douglas* framework—which requires the plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination—is an evidentiary standard, not a pleading requirement. See, e.g., 411 U.S., at 800. The Court has never indicated that the requirements for establishing a prima facie case apply to pleading. Moreover, the *McDonnell Douglas* framework does not apply where, for example, a plaintiff is able to produce direct evidence of discrimination. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121. Under the Second Circuit's heightened pleading standard, however, a plaintiff without direct evidence at the time of his complaint must plead a prima facie case of discrimination even though discovery might uncover such direct evidence. It seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered. Moreover, the precise requirements of the prima facie case can vary with the context and were 'never intended to be rigid, mechanized, or ritualistic.' *Furnco*

Constr. Corp. v. Waters, 438 U.S. 567, 577. It may be difficult to define the precise formulation of the required prima facie case in a particular case before discovery has unearthed relevant facts and evidence. Consequently, the prima facie case should not be transposed into a rigid pleading standard for discrimination cases."—*Swierkiewicz v. Sorema,* 534 U.S. at 506 and 507(2002).

Furthermore, the U.S. District Court in *Johnson v. Gadson* et al 06-22(RWR) *held*: Defendants also argue that issue preclusion and the statute of limitations should bar this action. These contentions are without merit. Issue preclusion does not apply here because the events giving rise to the claims against the moving defendants have never before been litigated. The three-year D.C. statute of limitations on personal injury claims, D.C. Code § 12-301(8), which applies here by operation of a Supreme Court decision, *Owens v. Okure,* 488 U.S. 235, 249-50(1989), does not bar this action because Johnson filed this action on January 9, 2006, complaining of events that occurred no earlier than January 15, 2003. See also *Carter v. District of Columbia,* 14 F.Supp. 2d 97, 102 (D.D.C. 1998)(stating that plaintiffs in this court "have the right to bring a Section 1981 or a Section 1983 claim at any time within three years of the alleged discrimination").

ARGUMENT

A. The issue of whether Johnson failed to state a claim upon which relief may be granted

Attorney Jesse Gadson, a Black attorney, stated to Kenneth Johnson's face, "You have no civil rights", because of the fact that Johnson is a White man of mixed racial ancestry. He does not think that Black people have no civil rights; he only thinks that Kenneth W. Johnson has no civil rights, because of the fact that Kenneth W. Johnson is a White man of mixed racial ancestry. Kenneth W. Johnson alleges in the Amended Complaint that Jesse Gadson told him to his face, "***You have no civil rights***". The allegation must be taken as true. See *Swierkiewicz v. Sorema*, 534 U.S. 506. The statement by Jesse Gadson: "***You have no civil rights***" falls in the category ***of discriminatory statements or attitudes*** on the part of the defendant. See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc). Jesse Gadson's statement begs the question: What is it about Kenneth W. Johnson that makes Jesse Gadson think that Kenneth W. Johnson has no civil rights [?], which is what Gadson said. Jesse Gadson does not think his Black clients have no civil rights; he thinks that about Kenneth W. Johnson, because Johnson is a White man of mixed racial ancestry.

Jesse Gadson, Tony Lee, and McGuireWoods LLP discriminated against Johnson. See Amended Complaint at pages 51-61, 68-79, and 39-50.

B. The issue of whether Johnson was *deny equal protection of law and equal benefit of law.*

The "Brief in Opposition for Respondents Tony S. Lee and McGuireWoods LLP" maintains that the "Petitioner's equal protection claim, not formally pled in the district court as a count in the Amended Complaint, similarly fails to state any cause of action" completely misses the point. The issue is not whether the Defendants denied Johnson equal protection of law, or equal benefits of law, but Whether the U.S. District Court and/or the United States Court of Appeals denied Johnson equal protection of law and equal benefits of law.

What Johnson is saying is that by disobeying the Supreme Court's precedent in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222, the U.S. District Court and the United States Court of Appeals for the District of Columbia Circuit have denied Johnson equal protection of law.

The U.S. District Court should have 1) vacated its judgment; 2) allowed Johnson to conduct discovery of the defendants; and 3) allowed Johnson to amend the June 9th 2006 Amended Complaint. By not doing so, the U.S. District Court denied Johnson equal protection of law and equal benefit of law. The Judgment was affirmed on appeal, thus, denying Johnson equal protection of

law. Discovery would have revealed that the Defendants offer their services to nonwhite customers, yet refused Kenneth Johnson. Johnson did not need to amend the Complaint to assert allegations that he was racially discriminated against, because those allegations were already present in the Amended Complaint. Johnson wanted to conduct discovery of the defendants, add additional allegations to the Amended Complaint, and change the "Compensatory and Punitive Damages" portion of the Amended Complaint at page 101 of the Amended Complaint.

Johnson has been denied the protections of law and the benefits of law that are spelled out in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222 or TITLE 42 U.S.C. § 1981 or Fed.Rules.Civ.Proc.Rules 15(a), 59(e), 60(b), 28 U.S.C.A. or *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc)! Johnson did not fail to state a claim upon which relief may be granted.

Aka v. Wash. Hosp. Ctr.,, 156 F.3d at 1284, 1289(D.C. Cir. 1998) (en banc) holds: In attacking a defendant's explanation, a plaintiff is entitled to offer three categories of evidence: (1) evidence establishing the plaintiff's prima facie case; (2) evidence the plaintiff presents to attack the Defendant's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff; such as

independent ***evidence of discriminatory statements or attitudes*** on the part of the Defendants. The explanations that the Defendants gave to Kenneth W. Johnson w[ere] merely pretext to hide [t]he racial discrimination against Johnson, because Johnson is a White man of mixed racial ancestry.

Tony Lee and McGuireWoods LLP were not "time-barred" from pursuing Johnson's claims of fraud upon the court, as a matter of law. "The only instance in which Rule 60(b) allows for the reopening of lawsuits regardless of the passage of time is when there is an allegation of fraud upon the court, for the law favors discovery and correction of corruption of the judicial process even more than it requires an end to lawsuits." *Lockwood v. Bowles*, D.C.D.C. 1969, 46 F.R.D. 625, 634.

The Supreme Court of the United States, itself, vacated a 1932 Judgment in 1944 that was attack in 1941 on the basis that the Judgment had be procure by way of "fraud upon the court" in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1944). "Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though Hartford's corruption had been exposed at the original trial."— *Hazel* Id. supra at 250.

Numerous United States Courts of Appeals have held that "fraud upon the court" has no time limit. "...a decision produced by fraud upon the

court is not in essence a decision at all and never becomes final" —7th Circuit, United States Court of Appeals, *Kenner v. Commissioner of the Internal Revenue*, 387 F.2d 689, 691, certiorari denied 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112. See also the 2nd Circuit, U.S. App., *Serysko v. Chase Manhattan Bank*, 461 F.2d 699, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139; or the 10th Circuit, U.S. App., *Wilkin v. Sunbeam Corp.*, 405 F.2d 165; or the District of Columbia Circuit, U.S. App., 195 F.2d 774; or the 9th Circuit, U.S. App., *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 625, 640, citing Wright & Miller, affirmed C.A. 9th, 645 F.2d 699, certiorari denied 102 S.Ct. 976, 454 U.S. 1126, 71 L.Ed.2d 113." See WRIGHT-MILLER-KANE, Federal Practice and Procedure § 2870, pages 409-412.

The Superior Court for the District of Columbia's January 12, 2004 Order in Johnson v. District of Columbia, Civil Action 3837-98 states in pertinent part: "Where, as here, the plaintiff asks the court to vacate judgment due to fraud, he must show the following elements with respect to defendants' behavior: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action taken in reliance upon the representation. *Cobb v. Cobb*, 116 WLR 1993 (Super. Ct. 1998). Assuming the plaintiff proves all five of the above elements, the court may then set aside the earlier decree, even if the present case was filed well after the general year-long

limitation. *Cobb v. Cobb* Id. supra is the vacate of a 1976 Judgment in 1998 for fraud upon the court.

Tony Lee and McGuireWoods LLP were not "barred" from pursuing Johnson's federal civil rights claims by the D.C. Code 12-309 notice requirement, as a matter of law. See *Brown v. United States*, 239 U.S.App.D.C.345, 356-357 (en banc): "We hold that appellant's noncompliance with 12 D.C. Code § 309 cannot bar his federal claims".

Tony Lee and McGuireWoods LLP were not "barred" from pursuing Johnson's right to the recovery of his real property by D.C. Code 12-301(1). D.C. Code 12-301(1) allows a plaintiff a 15 year statute of limitation to recovery real estate that the plaintiff has lost as a direct result of the conduct of a defendant. The District of Columbia ran Johnson out of business, and close his business down through the uses of police power and governmental authority, causing Johnson to lose his real property when they destroyed the income that the business was producing by closing it down, so that, Johnson loss the income which enabled him to pay the $2,900.00 monthly payments on his commercial building.

Tony Lee and McGuireWoods LLP were not "barred" from pursuing Johnson's federal civil rights claims by the "doctrine of equitable tolling". The elements for equitable tolling are, 1) that plaintiff has been pursuing his or her rights diligently, and 2) that some extraordinary

circumstance stood in his/her way." See *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Johnson pursed his rights diligently from the moment he filed the lawsuit in 1998 in the Superior Court, until now in 2008. To understand the "extraordinary circumstance" that stood in Johnson's way, it would require the Supreme Court to read the 106 page Amended Complaint, and to hear about the crushing poverty inflicted on Johnson that was the result of the "attacks" on Johnson and his business by the District of Columbia, it's police officers, and its attorneys who committed "fraud upon the court".

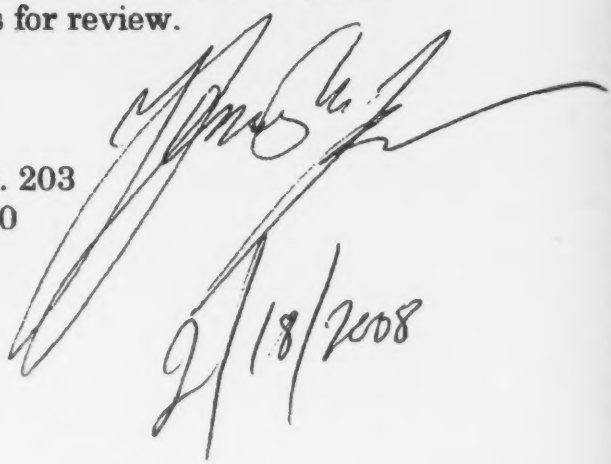
Tony Lee and McGuireWoods LLP simply did not want to purse Johnson's claims, because of the fact that Johnson is a White man of mixed racial ancestry. Moreover, they did not due for Kenneth W. Johnson what they have done for their other clients. Tony Lee used the long handled spoon in dealing with Kenneth W. Johnson from the very beginning of the relationship. First he signed the name of another attorney, that Johnson has never even met, to the retainer agreement right in front of Johnson's face, then after Johnson protested, he still would not sign his entire name, "Tony S. Lee" but would only sign his initials "T.S.L." to the retainer. He engaged in racial discrimination towards Johnson: See the Amended Complaint at pages 51-61 and the Amended Complaint at pages 68-79.

CONCLUSION

For the reasons set forth herein, Johnson asks the Supreme Court of the United States to grant this Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, and asks the Supreme Court to mandate that the "Record" in the United States Court of Appeals for the District of Columbia in the case of Johnson v. Gadson et al., 06-7171 and 06-7204 be certified and transferred to the Supreme Court of the United States for review.

Kenneth W. Johnson

9803 Allenford Circle, Apt. 203
North Potomac, MD, 20850
240-314-7188



91

(5)

FILED
APR 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-907

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR REHEARING PURSUANT TO SUPREME COURT RULE 44.1

Kenneth W. Johnson
Non-attorney, *pro se litigant of record*
9803 Allenford Circle, Apt. 203
North Potomac, Md. 20850
Telephone: (240) 314-7188

Questions Presented for Review

Plaintiff signed a long term 10-year lease with the landlord of the building that housed Plaintiff's business. The DCMPD investigated and persecuted Plaintiff for the sole purpose of closing down Plaintiff's establishment and depriving him of his tenancy. This, despite the fact that Plaintiff did nothing wrong and was completely and utterly vindicated in a trial before Superior Court.

1) Whether it is a violation of an individual's rights to equal protection of law and to justice under law to arrest him without probable cause, prosecute him without probable cause, close his business down without probable cause, deprive him of his livelihood without probable cause, and after he is acquitted of all charges and utterly vindicated of all wrong doing in a court of law, refuse him legal representation for the recovery of his livelihood and commercial real property, simply and exclusively, because he is a White man of mixed racial ancestry?

2) Whether refusing Johnson legal services, because of an invidious discriminatory racial animus violates TITLE 42 U.S.C. § 1981?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States District Court for the District of Columbia and United States Court of Appeals for the District of Columbia Circuit.

The Petitioner here and Plaintiff – Appellant below is Kenneth W. Johnson.

The Respondents here and Defendants – Appellees below are Jesse Gadson, Tony S. Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, McGuireWoods LLP.

CORPORATE DISCLOSURE STATEMENT

Kenneth W. Johnson is a person, an individual, a human being, and therefore, is not a corporation. There is no parent or publicly held company owning 10% or more of any corporate stock, a statement to this effect shall be included on this page. Supreme Court Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDINGS.....ii

CORPORATION DISCLOSURE STATEMENT....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv-v

JURISDICTION STATEMENT.....1

RELEVANT STATUTES IN THE CASE.....1

STATEMENT OF THE CASE.....1

STANDARD OF REVIEW.....3

ARGUMENT

I. Johnson states that the record does not amply reveal that Johnson's claims against the District of Columbia were time barred or without merit. Johnson's claims had merit, and Johnson's claims were not time-barred. The previously filed "Reply Brief for Petitioner Kenneth W. Johnson" addresses the "time-barred" issue.....4

CONCLUSION.....14

TABLE OF AUTHORITIES

FEDERAL CASES

Brown v. United States, 239
U.S.App.D.C.345, 356-357 (en banc).....11

Covad Communs. Co. v. Bell Atlantic Corp.,
398 F.3d 666, 676 (D.C. Cir. 2005).....3

Johnson v. Fairfax Village Condo.
IV 641 A.2d 495, 503 (D.C.App. 1994).....9

Gwinn v. District of Columbia,
434 A.2d 1376, 1378 (D.C. 1981).....10

McDonald v. Santa Fe Trail Transp.
Co., 427 U.S. 273, at 274.....5

Swierkiewicz v. Sorema, 534 U.S. 506.....3

Williams v. Staples, Inc. 372 F.3d 662,
667.....4

FEDERAL STATUTES

TITLE 28 U.S.C § 1254.....1

TITLE 42 U.S.C. § 1981.....1, 2, 4, 5

TITLE 42 U.S.C. § 1983.....1

FEDERAL RULES OF CIVIL PROCEDURE

Fed.R.Civ.P. 12(b)6.....2, 3

FEDERAL CONSITUTIONAL AMENDMENTS

14th AMENDMENT.....11

STATE CASE

Cobb v. Cobb, 116 WLR 1993 (Super. Ct. 1998).....8

STATE STATUES

D.C. Code § 12-301(1).....5, 6, 7

D.C. Code § 12-309.....11

JURISDICTIONAL STATEMENT

On December 26th 2007, Johnson filed a Petition for a Writ of Certiorari that sought review of [t]he October 9th 2007 JUDGMENT of the United States Court of Appeals for the District of Columbia Circuit pursuant to TITLE 28 U.S.C. § 1254.

RELEVANT STATUTES IN THE CASE

42 U.S.C. § 1981 is accurately reproduced on page 2 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On January 9th 2006, Johnson filed a Complaint that contained [4] Counts, in the United States District Court for the District of Columbia.

On May 30, 2006, the district court granted Petitioner's motion for leave to amend his Complaint to add McGuireWoods LLP as an additional defendant. On June 9th 2006, Johnson filed a 106-page Amended Complaint that contained [3] Counts: COUNT 1 "LEGAL MALPRACTICE", COUNT 2 "TITLE 42 U.S.C. § 1983 "CUSTOM"", COUNT 3 "TITLE 42 U.S.C. § 1981". The 4th Count in the Original Complaint was not in the Amended Complaint.

On July 10, 2006, McGuire Woods LLP and Tony Lee moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)6 for failure to state a claim on which relief could be granted.

Respondents Gadson, Harmon, Condon, and Shore, also filed similar motions.

By Order dated September 19, 2006, the district court granted the Rule 12(b)(6) motions to dismiss. The district court concluded that Petitioner failed to state any claims upon which relief could be granted.

STANDARD OF REVIEW

The function of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)6 is to "test the sufficiency of the plaintiff's allegations," while a motion for summary judgment pursuant to Fed.R.Civ.Pro. 56 is to "test the sufficiency of the non-moving party's evidence in light of the legal theory it has advanced." *Covad Communs. Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 676 (D.C. Cir. 2005).

In *Covad* Id. supra, the Court stated: "Alternatively, Bell Atlantic urges us to hold, as a matter of law, that its bringing the patent suit could not have harmed competition. In so doing, Bell Atlantic confuses the function of a motion to dismiss pursuant to Rule 12(b)6, which tests the sufficiency of the plaintiff's allegations, with a motion for summary judgment pursuant to Rule 56, which tests the sufficiency of the non-moving party's evidence in light of the legal theory it has advanced. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) ("simplified notice pleading standard [of the Federal Rules of Civil Procedure] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims").

ARGUMENT

I. Johnson states that the record does not amply reveal that Johnson's claims against the District of Columbia were time barred or without merit. Johnson's claims had merit, and Johnson's claims were not time-barred. The previously filed "Reply Brief" addresses the "time-barred" issue.

The Brief in Opposition For Respondents Tony S. Lee and McGuireWoods LLP states: "The record amply reveals that Respondents refused to represent him because his claims against the District of Columbia stemming from his 1997 arrest were either without merit, or time-barred. Thus, this Court should deny him a writ of certiorari."

The United States Court of Appeals for the Fourth Circuit held: "To establish a prima facie case of unlawful racial discrimination relating to the purchase of goods or services under 42 U.S.C. § 1981, the plaintiff must establish that: (1) he is a member of a protected class; (2) he sought to enter into a contractual relationship with the defendant; (3) he met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) he was denied the opportunity to contract for goods or services that w[ere] otherwise afforded to white customers."—*Williams v. Staples, Inc.* 372 F.3d 662, 667.

To establish a prima facie case of unlawful racial discrimination relating to the purchase of goods or services under 42 U.S.C. § 1981, within the context of the instant case, Johnson v. Gadson et. al., the plaintiff must establish that: 1) Johnson is a White man of mixed racial ancestry whose physical appearance is either White/European or predominately White/European; (2) Johnson sought to enter into a contractual relationship with the defendant(s); (3) Johnson met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; (4) and Johnson was denied or refused the goods or services that w[ere] otherwise afforded to nonwhite customers. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273. Johnson's Amended Complaint maintains that he is an American of European heritage, and is White.

The pleading that Respondent Tony S. Lee drafted and e-mailed to Johnson for filing in the U.S. District Court states:

> "Section 12-301(1) provides that an action for the recovery of tenements must be filed within 15 years of accrual of the cause of action. It is obvious that Plaintiff cannot recover his lost tenement from Defendants because his business has been irrevocably ruined, and Defendants do not have the ability to grant him a new lease even if ordered by the Court. However, what Plaintiff does seek is recovery of the value of the lost tenement caused by

> Defendants' action. Although this is a case of first impression for the Court as a search for relevant case law failed to reveal any cases directly on point, this is similar to the situation where a plaintiff sues for the recovery of property, but cannot do so because it has been destroyed. Such plaintiff cannot recover the actual property, but the plaintiff can recover the value of the converted property. The 15-year limitations period in § 12-301(1) is most appropriate for this case given that the DCMPD's actions were purposefully directed towards closing down Plaintiff's business and depriving him of his tenement, and therefore, Plaintiff's complaint is not barred by the applicable statute of limitations because this action is filed well within the 15 year time period."

The United States Court of Appeals for the District of Columbia Circuit's April 7, 2004 ORDER states in pertinent part: "The district court properly dismissed appellant's claims as barred by the statutes of limitations and correctly determined that the 15-year limitations period for actions "for the recovery of lands, tenements, or hereditaments," D.C. Code § 12-301(1), does not apply. Appellant has conceded that he "cannot recover his lost tenement" and has provided no basis for tolling the statute of limitations."

2001 Edition D.C. Code § 12—301. Limitation of time for bringing actions. "Except as otherwise specifically provided by law, actions for

the following purpose may not be brought after the expiration of the period specified below from the time the right to maintain the actions accrues: (1) for the recovery of lands, tenements, or hereditaments—15 years; (2) for the recovery of personal property or damages for its unlawful detention—3 years; (3) for the recovery of damage for an injury to real or personal property—3 years."

Here Tony S. Lee is playing on Kenneth W. Johnson's ignorance of the law (as his lawyer) in order to "prevent" Johnson from benefitting from the 15-year statute of limitations for the recovery of lands, tenements, or hereditaments pursuant to D.C. Code § 12-301(1). This was a very insidious scheme: Tony S. Lee is not trying to help Kenneth W. Johnson; he's trying to hurt Johnson by putting language before the U.S. District Court and the U.S. Court of Appeals that Johnson "cannot recover his lost tenement" and "preventing" Johnson from benefitting from the 15-year statute of limitations. The Amended Complaint charges that Tony S. Lee engaged in intentional sabotage of Johnson's case, because Johnson is a White man of mixed racial ancestry.

The Superior Court for the District of Columbia's January 12, 2004 Order in *Johnson v. District of Columbia*, Civil Action 3837-98 states in pertinent part: "Where, as here, the plaintiff asks the court to vacate judgment due to fraud, he must show the following elements with respect to defendants' behavior: (1) a false representation, (2) in reference to a material fact, (3) made with

knowledge of its falsity, (4) with the intent to deceive, and (5) action taken in reliance upon the representation. *Cobb v. Cobb*, 116 WLR 1993 (Super. Ct. 1988). Assuming the plaintiff proves all five of the above elements, the court may then set aside the earlier decree, even if the present case was filed well after the general year-long limitation." In *Cobb* Id. supra, the Court held:

> "There could be no serious question that the representations in these affidavits were material and that action was taken in reliance thereon by the Court. Thus, the critical issues are whether these representations were false, whether Mr. Cobb knew they were false, and whether he intended to deceive the Court. In evaluating these issues, the Court notes that the elements need not be proved by direct evidence, but may be established by reasonable inferences deducible from circumstantial evidence. See Standardized Civil Jury Instructions for the District of Columbia, No. 20-2 (1981)."—*Cobb v. Cobb*, 116 WLR 1993 (Super. Ct. 1988).

Attorney Tony S. Lee read the pleadings filed by the District of Columbia's attorney James A. DeVita, which state: "On May 21, 1998, plaintiff filed his complaint in the above-captioned matter alleging, inter alia, that he was subject to harassment by the District of Columbia Metropolitan Police Department. On May 22, 1998, plaintiff filed a virtually identical complaint in the case of Johnson v. O'Boyle C.A. 98-3875, in which

he also alleged that he was the victim of police harassment. On May 26, 1998, a hearing was held on plaintiff's motion for a temporary restraining order in the O'Boyle case. At that hearing, Judge Zinora Rankin denied plaintiff's motion for a temporary restraining order and dismissed plaintiff's complaint with prejudice" — "Since the instant complaint is virtually identical to the complaint which was dismissed with prejudice in Johnson v. O'Boyle, C.A. 98-3875, plaintiff's claim in this case is barred by the doctrine of issue preclusion, collateral estoppel and res judicata. *Johnson v. Fairfax Village Condo.* IV 641 A.2d 495, 503 (D.C.App. 1994)"—Memorandum of Points & Authorities in Support of Defendant's Motion to Dismiss, or, in the alternative, for Summary Judgment, Exhibit Volume 2 of 3, at page 313–314.

Here attorney James A. DeVita is telling Judge Wendell P. Gardner, that he is precluded from hearing Johnson's claims against the District of Columbia, because Johnson's claims have already been heard by another Judge, Judge Zinora Rankin. It was a complete lie: Judge Zinora Rankin never heard, nor did she decide Johnson's claims for the deprivation of his 14th Amendment rights, the 1997 arrest, prosecution, and closing down of Johnson's business on May 17, 1997.

Attorney Tony S. Lee read the pleadings filed by the District of Columbia's attorney James A. DeVita, which state:

"Plaintiff's common law claims for false arrest and police harassment must be dismissed or summary judgment granted due to plaintiff's failure to provide the District of Columbia with notice of his claim within six months of the date upon which he suffered injury. D.C. Code Section 12-309 (1995 Reply. Volume). District of Columbia Code Section 12-309 provides:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Mayor of the District of Columbia of the approximate time, place, and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is sufficient notice under this section.

The purpose of this notice requirement is to ensure that District of Columbia officials are given prompt notice of claims for potentially large sums of money so that they can 1) quickly investigate before evidence becomes lost or witnesses unavailable; 2) correct hazardous or potentially hazaradous conditions and 3) settle meritorious claims. *Gwinn v. District of Columbia*, 434 A.2d 1376, 1378 (D.C. 1981) This notice requirement is mandatory and if there is no timely written notice, plaintiff is precluded from litigating his claim. Id."—Exhibit Volume 2 of 3, at page 315.

Attorney Tony S. Lee knew that the District of Columbia's attorney James A. DeVita applied the 12-309 notice requirements exclusively to "common law claims for false arrest and police harassment" leaving Johnson's claims of racial discrimination, deprivation of Johnson's federal constitutional rights under the 14th Amendment, and other claims for the violations of Johnson's federally guaranteed civil rights completely untouched by D.C. Code 12-309. Moreover, Tony Lee read *Brown v. United States*, 239 U.S.App.D.C.345, 356-357 (en banc): "We hold that appellant's noncompliance with 12 D.C. Code § 309 cannot bar his federal claims". Johnson's claims were raised in the context of violations of federal law.

The Superior Court's Order states: "Upon consideration of defendant District of Columbia's unopposed motion to dismiss plaintiff's complaint, the record herein, it is ORDERED, that the defendant's motion is GRANTED this 15th Day of July 15th 1998, Judge Wendell P. Gardner"—Exhibit Volume 2 of 3, at page 317.

Attorney Tony S. Lee read the criminal trial transcripts, which state in pertinent parts, "Now, *Harris* says the Government must prove first that acts take place on the premises that disturb the public or constitute a nuisance per se. And nuisance per se is to find as in the nature of a gambling house or a bawdy-house. The acts that either disturb the public or constitute a nuisance per se must be acts that take place on the premises. And I find that that requires the Court to make a

clear distinction between activities that occurred inside the Taj Mahal and those that occurred out on the street.... It is not and was not during the period in which this offense was allegedly committed the responsibility of Mr. Johnson or of any other private citizen to police the neighborhood of the Taj Mahal Club. It was the responsibility of the Metropolitan Police Department to do that. Their utter failure to perform that responsibility does not transfer the blame to Mr. Johnson. Mr. Johnson had no authority to police that area and would have subjected himself to great risk had he even attempted to do so.... Now, what took place inside the premises? Up to five hundred young people, perhaps as many as three hundred at any one time occupied these premises and listened to music of the type that they happened to enjoy and danced. They were searched before they went in. On four occasions when officers entered the club – well, on those four occasions there was only one time that any officer saw any illegal activity, and that was the occasion when a juvenile came out of the restroom smoking a marijuana cigarette. Even that activity, the juvenile apparently thought it necessary to go hide in the restroom rather than commit it out openly in the larger room. The undercover officer saw no illegal activity. Detective Haggerty saw no illegal activity. No one saw any illegal activity during the four times that the police entered this club other than that one marijuana cigarette.... In the Court's view that is a rather petty yield for all the efforts that the Government or the police department put into its efforts to build a case against the Taj Mahal Club. It hardly is

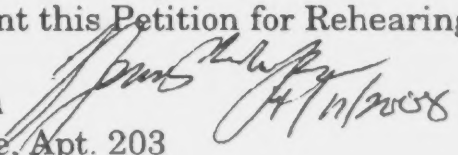
enough to say that the club was regularly resorted to for the commission of thee acts. It was regularly resorted to listen to music and to dance. And as a defense has contended there is nothing unlawful about that activity.... I've not in four, five – – four days of trial heard of a single instance in which a police presence was effected during the hours of operation of this club. The police were much more interested in trying to patch together a case for closing down the club than they were in preventing the activity of which the Government now complains.... That's also why the dam analogy that the Government makes, doesn't work. There was water that came through that dam and did damage. But there is nothing that came out of this club and did damage.... In any event, the Court believes that it erred in denying the defense's motion for judgment of acquittal at the end of the Government's case and it grants that motion at this time. Parties may be excused."—[Exhibit Volume 2 — 368-377]. Kenneth W. Johnson's testimony:

"THE COURT: When did you first provide a signed Form 180B to an officer to be submitted up through the chain of command? THE WITNESS: It would have been back in January. THE COURT: Of what year? THE WITNESS: It would have been back in January. THE COURT: Of what year? THE WITNESS: '96. THE COURT: So from January through all of '96 and the first five months of '97, you were not able to get a single application approved? That's correct, Your Honor." —[Exhibit Volume 1 at 217— See 207-221].

"THE COURT: I have a question, but I will not ask if either side wishes that I not and that is what was the Chief's response to Mr. Johnson's letter? THE COURT: Let me see it, sir. The letter states the Department's currently reviewing the practice of off-duty officers working at establishments with an ABC or a public hall license. Until a final decision has been rendered the request is denied." —221 See also [Exhibit Volume 2 — 371]: "the third element set out by *Harris* that the proprietor knows or should know of the acts and does nothing to prevent them."

CONCLUSION

Johnson asks the Supreme Court of the United States to grant this Petition for Rehearing.



Kenneth W. Johnson
9803 Allenford Circle, Apt. 203
North Potomac, MD, 20850
240-314-7188